

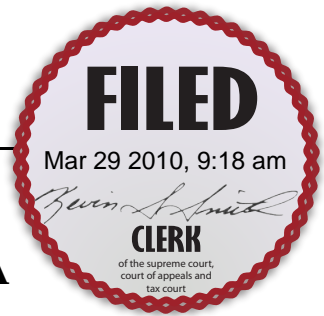
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ATTORNEYS FOR APPELLANT:

**JON C. ABERNATHY
BETH A. SCHENBERG**
Goodin Abernathy, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**ROBERT M. EDWARDS, JR.
BRIAN R. GATES**
Jones Obenchain, LLP
South Bend, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES THACKER,)

Appellant-Plaintiff,)

vs.)

No. 20A03-0911-CV-526)

FAIRMONT HOMES, INC.,)

Appellee-Defendant.)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0703-CT-23

March 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Charles Thacker appeals the grant of the Indiana Trial Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction filed by Appellee-Defendant Fairmont Homes, Inc. We affirm.

Issue

Thacker raises three issues on appeal, which we revise and restate as the following issue: whether Commander Transport, Inc. was a subsidiary of Fairmont, making Fairmont a joint employer of Thacker as opposed to a third party for the purposes of the Indiana Worker's Compensation Act.

Facts and Procedural History

The relevant facts are undisputed. Thacker started working for Fairmont in 1978 as a driver, transporting factory built homes from the Nappanee factory to an offsite location. In 1996, Commander was incorporated. Ownership of the corporation was structured as follows: Fairmont 41%, Gulf Stream Coach, Inc. 49%, and a private individual 10%. At the relevant time, Fairmont held ownership of approximately 42% of the outstanding voting shares of Gulf Stream. Shortly after the creation of Commander, Thacker's employment was transferred from Fairmont to Commander.

On March 28, 2005, another Commander truck driver that was turning his truck into a Fairmont-owned parking lot accidentally struck Thacker as he was walking through the unlit lot. Thacker was injured and, as a result, Thacker filed a complaint against Fairmont alleging negligence in its failure to maintain proper lighting on the property. In response, Fairmont

filed a 12(B)(1) Motion to Dismiss, contending that Commander is a subsidiary of Fairmont, barring Thacker from remedies outside of the Indiana Worker’s Compensation Act. After a hearing, the trial court granted the motion. This appeal ensued.

Discussion and Decision

I. Standard of Review

The Indiana Supreme Court set out the applicable standard of review in GKN Company v. Magness:

When an employer defends against an employee’s negligence claim on the basis that the employee’s exclusive remedy is to pursue a claim for benefits under the Indiana Worker’s Compensation Act, the defense is properly advanced through a motion to dismiss for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider not only the complaint and motion but also any affidavits or evidence submitted in support. In addition, the trial court may weigh the evidence to determine the existence of the requisite jurisdictional facts.

....

If the facts before the trial court are not in dispute, then the question of subject matter jurisdiction is purely one of law. Under those circumstances no deference is afforded the trial court’s conclusion because “appellate courts independently, and without the slightest deference to trial court determinations, evaluate those issues they deem to be questions of law.” Thus, we review *de novo* a trial court’s ruling on a motion to dismiss under Trial Rule 12(B)(1) where the facts before the trial court are undisputed.

GKN Co. v. Magness, 744 N.E.2d 397, 400-401 (Ind. 2001) (citations omitted).

II. Analysis

The ultimate question to be resolved in this case is whether Thacker’s exclusive remedy for his injuries that occurred in the scope of his employment is through the Indiana

Worker's Compensation Act ("WCA"). The answer is dependent on whether Commander falls within the definition of a subsidiary of Fairmont.

Generally, the WCA is the exclusive remedy for an employee against his or her employer to obtain "compensation for personal injury or death by accident arising out of and in the course of employment." Ind. Code §§ 22-3-2-2 and 22-3-2-6. However, the WCA does not limit an employee from bringing an action against a third party who has a legal liability to pay damages for the injuries sustained by the employee. Ind. Code § 22-3-2-13. Thus, crucial to many negligence cases is whether an entity qualifies as an employer or a third party under the WCA.

Thacker contends that McQuade v. Draw Tite, Inc. is relevant to the interpretation of the term "employer." McQuade held that the defensive use of piercing the corporate veil was not permitted and that the "exclusivity provision of Indiana's Worker's Compensation Act does not prevent an employee from suing his or her employer's parent corporation." McQuade v. Draw Tite, Inc., 659 N.E.2d 1016, 1020 (Ind. 1995). However, the Indiana Legislature has since amended the WCA definition of employer by adding the language that parent corporations are considered joint employers with their subsidiaries. The WCA now defines "Employer" in relevant part to include: "A parent corporation and its subsidiaries shall each be considered joint employers of the corporation's, the parent's, or the subsidiaries' employees for purposes of Indiana Code § 22-3-2-6 and Indiana Code § 22-3-3-31." Ind. Code § 22-3-6-1 (Burns Supp. 2009).

Under Indiana Business Corporation Law, a "subsidiary" is defined as a "corporation

of which a majority of the outstanding voting shares entitled to be cast are owned (directly or indirectly) by” any other resident domestic corporation. Ind. Code § 23-1-43-16. Using this definition, it is clear that Commander is a subsidiary of Fairmont. At the time in question, Fairmont directly owned 41% of the voting shares of Commander and indirectly owned additional shares based on its 42% ownership of Gulf Stream, the other major shareholder of Commander. Fairmont’s direct and indirect ownership of voting shares constitutes a majority of the outstanding voting shares of Commander. Thus, as Commander’s parent corporation, Fairmont is a joint employer of Thacker, making the WCA Thacker’s exclusive remedy for his employment-related injuries. The trial court properly dismissed the complaint for lack of subject matter jurisdiction.

Affirmed.

BAKER, C.J., and ROBB, J., concur.